PD-1034-20

IN THE

Texas Court of Criminal Appeals

TERRY MARTIN,
***Appellant*,**

v.

STATE OF TEXAS,
***Appellee*.**

On Appeal From
THE SEVENTH COURT OF APPEALS
AMARILLO, TEXAS
No. 07-19-00082-CR

and

COUNTY COURT AT LAW NO. 2
LUBBOCK COUNTY, TEXAS
No. 2019-494,736

BRIEF FOR APPELLANT TERRY MARTIN

LORNA L. BUENO
State Bar No. 24086726
Lorna Law, PLLC
PO Box 1267
Shallowater, Texas 79363
Phone: (806) 482-1340
lorna@lornalaw.com

JOEL COOK
State Bar No. 24044289
Seymore Law Firm
810 Main Street
Lubbock, Texas 79401
Phone: (806) 747-3825
joel.cook@outlook.com

Counsel for Appellant-Respondent
April 23, 2021

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

<table>
<tr><th colspan="2">JUDGES</th></tr>
<tr><td colspan="2">HON. DRUE FARMER
County Court at Law No. 2, Lubbock County, Texas

CHIEF JUSTICE BRIAN QUINN, JUSTICE JUDY C. PARKER,
AND JUSTICE LAWRENCE M. DOSS
Seventh Court of Appeals, Amarillo, Texas</td></tr>
<tr><th colspan="2">PARTIES & COUNSEL</th></tr>
<tr><td>TERRY MARTIN
Respondent/Appellant</td><td>STATE OF TEXAS
Petitioner/Appellee</td></tr>
<tr><td><u>Trial Counsel</u>

RUTH CANTRELL
RUTH CANTRELL LAW OFFICE
1106 6th Street
Lubbock, Texas 79424

<u>Appellate Counsel before Court of Appeals</u>

LORNA BUENO
LORNA LAW, PLLC
PO Box 1267
Shallowater, Texas 79363

<u>Appellate Counsel before this Court</u>

LORNA BUENO
LORNA LAW, PLLC &

JOEL COOK
SEYMORE LAW FIRM
810 Main Street
Lubbock, Texas 79401</td><td><u>Trial Counsel</u>

ERIN VAN PELT
ALAN BUROW
P.O. Box 10536
Lubbock, Texas 79408–3536

<u>Appellate Counsel before Court of Appeals</u>

JEFFREY S. FORD
Assistant District Attorney
P.O. Box 10536
Lubbock, Texas 79408–3536

<u>Appellate Counsel before this Court</u>

EMILY JOHNSON-LIU
Assistant State Prosecuting Attorney
PO Box 13046
Austin, Texas 78711</td></tr>
</table>

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page(s)**

INDEX OF AUTHORITIES CONTINUED

Cases **Page(s)**

Statutes

INDEX OF AUTHORITIES CONTINUED

Statutes **Page(s)**

Legislative History

News Articles

PD-1034-20

IN THE

Texas Court of Criminal Appeals

TERRY MARTIN,
***Appellant*,**

v.

STATE OF TEXAS,
***Appellee*.**

On Appeal From
THE SEVENTH COURT OF APPEALS
AMARILLO, TEXAS
No. 07-19-00082-CR

and

COUNTY COURT AT LAW NO. 2
LUBBOCK COUNTY, TEXAS
No. 2019-494,736

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

TERRY MARTIN, RESPONDENT/APPELLANT, files this brief in support of his acquittal by the Seventh Court of Appeals, which correctly held that insufficient evidence supported his conviction for unlawful carry of a weapon by a criminal member of a street gang for purposes of Texas Penal Code section 46.02(a-1)(2)(C). The evidence clearly established Appellant had no criminal convictions and the only criminal charge brought against him was dismissed and his weapon returned to him.

STATEMENT OF THE CASE

On January 8, 2019, the State charged Appellant Terry Martin by information with unlawful possession of a weapon pursuant to Section 46.02(a-1)(2)(C) of the Texas Penal Code. (CR 13-14). The case proceeded to trial on January 28, 2019, and the jury returned a verdict of guilty. (CR 54). The jury assessed punishment at zero days in jail and a fine of $400. (CR 54). Martin appealed the facial and as-applied constitutionality of the statute, as well as the sufficiency of the evidence supporting Martin's conviction. The Seventh Court of Appeals held that Martin failed to preserve his constitutional issues at trial but ultimately acquitted Martin due to insufficient evidence supporting his status as a "member" of a "criminal street gang" for purposes of unlawful carry. This Court granted the State's Petition for Discretionary Review.

STATEMENT ON ORAL ARGUMENT

Oral argument was not granted.

ISSUES PRESENTED

Issue One: Should this Court adopt the holding of *Ex parte Flores*, which construed the term "member" in Texas Penal Code section 46.02(a-1)(2)(C) to mean that a "member" of a criminal street gang must be "one of the three or more persons with a common identifying sign, symbol, or identifiable leadership *and must also* continuously or regularly associate in the commission of criminal activities," 483 S.W.3d 632, 648 (Tex. App.—Houston [14th] 2015, pet ref'd) (emphasis added)?

Issue Two: Was evidence sufficient to support a conviction of unlawful carry by a gang member beyond reasonable doubt when Appellant admitted he belonged to a local Cossack Motorcycle Club, denied any knowledge of the Club's criminal activity, and lacked a criminal history apart from a *single* arrest on charges which were ultimately *dismissed*?

STATEMENT OF FACTS

On April 17, 2018, Appellant Terry Martin was stopped while riding a motorcycle on US Highway 87 in Lubbock County for travelling higher than the posted speed limit and for a partially obscured license plate, among other alleged traffic violations. (3 RR 14-15; 6 RR 34). Corporal Michael Macias also noticed that Martin was wearing a motorcycle vest, or "cut," that read "Cossacks MC." (6 RR 34). After pulling Martin over and patting him down, Officer Macias asked if Martin had any firearms on him. *Id.* Martin responded that he had a pistol inside his vest. *Id*. Officer Macias placed Martin in handcuffs while stating "I take it by your cut you're a Cossack?" Appellant answered, "Yes, sir." *Id.* Officer Macias informed Martin he was under arrest for unlawful carrying of a weapon because the Cossacks MC is considered a criminal street gang. *Id.*

Dash cam footage caught Officer Macias stating to another officer who arrived on scene, "Motorcycles, and I don't know if you work motorcycles very often, they're the easiest gangs to confirm because they got their confirmation on their back. They're wearing these cuts." (6 RR 34 at 16:35). Officer Macias also described an incident a few days earlier where the President of the El Paso Bandidos was arrested despite having

a concealed carry license. (6 RR 34 at 38:30). Officer Macias described multiple encounters with motorcyclists, how to identify them as gang members, and how he encouraged other officers to "start working some Bandidos." (6 RR 34 at 45:00-48:00).

At trial, the State offered testimony by Deputy Joshua Cisneros of the Lubbock Sheriff's Office. Officer Cisneros is a Texas gang expert who shares information with other members of the Texas Gang Investigators Association who work across multiple counties and areas of the State. (3 RR 54: *lines* 6-14). He testified that the Cossacks MC was not on "the radar" until the Twin Peaks shooting in Waco on May 17, 2015. (3 RR 91-92: *lines* 19-4 ("radar"); 3 RR 29: *line* 29 (date of incident)). Officer Cisneros could not identify the aggressors in the incident but could only state seven Cossacks died. (3 RR 91: *lines* 16-22). Officer Cisneros testified that several incidents leading up to Waco and since demonstrate a "continuing war going on with the Bandidos." (3 RR 92: *lines* 1-4). When asked about specific incidences of Cossacks criminal activity in Lubbock, Officer Cisneros testified that he could not prove the Cossacks' criminal activities, stating, "The only thing I do have is just intelligence." (3 RR 95: *lines* 9-10).

Martin testified that he joined the Cossacks MC over four years prior to trial, which would have been some time in 2014. (4 RR 38: *lines* 12-14). Martin was present at the Twin Peaks incident and was arrested, along with around 170 others who were present, and was charged with criminal organization. (4 RR 25-26). These charges were ultimately dismissed. (3 RR 145-46; 6 RR 23). A later report from the Waco Police Department revealed that police ran a background check and did not find anything that would prohibit Appellant from legally possessing a handgun. (3 RR 142-45). The Waco Police Department returned Appellant's gun to him. (3 RR 146). Other than this police report, the State introduced no evidence of any prior conviction or criminal activity involving Appellant. (5 RR 51-71). Appellant, in fact, had no criminal convictions on his record prior to his conviction in this case in the trial court.

SUMMARY OF THE ARGUMENT

This Court should affirm the Court of Appeals, which applied the reasoning *Ex parte Flores* by holding evidence was insufficient to support Appellant's conviction under section 46.02(a-1)(2)(C) of the Texas Penal Code because the Record did not establish Appellant was one of three or more persons with a common identifying sign, symbol, or identifiable leadership who also continuously or regularly associated in criminal activity. The *Flores* court properly followed long-established principles of statutory construction when it defined the term "member" in a way that excluded law-abiding citizens as the legislature intended. This Court can reasonably infer the legislature approved of the reasoning in *Flores* because it has since re-enacted the statute without clarifying the definition of "member."

Although the State urged the Court of Appeals to adopt the reasoning of *Flores*, it now abandons that position and seeks a broad construction of the statute that would open up unconstitutional floodgates by requiring neither criminal *mens rea* nor *actus reus* by the accused unlawful carrier, but instead would only require the accused join an association in which criminal activity occurs regularly among three or more individuals—even if the accused is unaware. Such construction directly contradicts legislative intent to protect law-abiding citizens from prosecution.

STANDARDS OF REVIEW.

Two standards of review are triggered in this case: sufficiency of the evidence by way of statutory construction.

A. Statutory Construction

Statutory construction is a question of law, which the review de novo. *Ramos v. State*, 303 S.W.3d 302, 306 (Tex. Crim. App. 2009). When construing statutes, the court seeks to effectuate legislative intent. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). The court first looks to the statute to determine if its language is plain. *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019), cert. denied, 139 S. Ct. 2749, 204 L. Ed. 2d 1135 (2019). The court presumes that the legislature intended for every word to have a purpose and should give effect if reasonably possible to each word, phrase, and clause of the statutory language. *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997). The court reads words and phrases in context and construes them according to the rules of grammar and usage. *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999). When the plain language leads to absurd results, or if the language of the statute is ambiguous, the court consults extra-textual factors to discern the legislature's intent. *Boykin*, 818 S.W.2d at 785–86.

B. Sufficiency of the Evidence

In determining whether the evidence is sufficient to support each element of a criminal offense, the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Under that standard, when assessing the sufficiency of the evidence to support a criminal conviction, the court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 912. The jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimonies, and the court will not usurp this role by substituting its judgment for that of the jury. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012).

ARGUMENT

The Court of Appeals properly applied the Fourteenth Court of Appeals' holding in *Ex parte Flores* when it held evidence was insufficient to uphold Appellant's conviction for unlawful carry under section 46.02(a-1)(2)(C) of the Texas Penal Code because no evidence supported Appellant continuously or regularly associated in criminal activity or was aware of any regular criminal activity in the Cossacks Motorcycle Club. *Martin v. State*, 07-19-00082-CR, 2020 WL 5790424, at *4 (Tex. App.—Amarillo Sept. 28, 2020, pet. granted); *Ex parte Flores*, 483 S.W.3d 632, 648 (Tex. App.—Houston [14th] 2015, pet ref'd). Initially, Appellant challenged the constitutionality of the statute because this Court has not yet endorsed the *Flores* court's construction of the word "member" within the statute. The State argued *Flores* was indeed the correct interpretation and urged the Court of Appeals to adopt this holding. Finding Appellant's unconstitutional challenges unpreserved, the Court of Appeals adopted and applied the reasoning of *Flores* and rendered a judgment of acquittal.

Without the limiting language of *Flores* that the State now unexplainedly eschews, the statute is facially unconstitutional. The State argues for the undefined term "member" to be interpreted without any context and provides no explanation as to how this interpretation would not

criminalize otherwise innocent behavior or thwart principles of civil liberties and justice. Thus, Appellant urges this Court to adopt the reasoning of *Flores* and affirm the judgment of the Court of Appeals.

I. In weighing the sufficiency of the evidence, the Court of Appeals relied on a legally sound construction of the Texas Penal Code's unlawful carry statute—specifically the term "member"—by reading the term in context to avoid unconstitutional results.

A. The Flores *court read section 46.02(a-1)(2)(C) in conjunction with section 71.01(d) in order to construe "member" in a way that would not reach substantial amounts of constitutionally protected conduct and would provide a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.*

In order to review the sufficiency of the evidence in this case, this Court must determine whether the proper, constitutional construction of Texas Penal Code section 46.02(a-1)(2)(C) was applied. The *Flores* construction of the statute began with plain language analysis. *Flores*, 483 S.W.3d at 645; *see Sims*, 569 at 640. The appellant argued in that case, as did Appellant in this present case, that a plain language reading of the term "member" did not require the member to know of the gang's criminal activities or to carry a gun with intent to further those activities; thus, the statute was overbroad. *Flores*, 483 S.W.3d at 645. The statute was also challenged for vagueness because it does not specify what conduct makes an individual a "member" of a criminal street gang; therefore, it

does not provide a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *Id.; see Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976) (holding the traditional standard of unconstitutional vagueness is whether the terms of a statute are so indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application."); *see also Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554 S.W.2d 924, 928 (Tex. 1977) (same).

The *Flores* court explained that section 46.02(a-1)(2)(C) derives its content from section 71.01(d), which defines "criminal street gang" as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." When "[r]ead together, these provisions indicate that a gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities." *Flores*, 483 S.W.3d at 645. This interpretation prevents the statute from reaching a substantial amount of constitutionally protected conduct and provides sufficient notice as to what conduct is prohibited, thus avoiding its overbreadth and vagueness, respectively. *Id.* The State's Brief before the Seventh Court of Appeals outlined the deci-

sion of the *Flores* court in greater detail when arguing that the court follow the analysis of *Flores* in interpreting Appellant's issues on appeal. *See* State's Brief-COA7 at 8-12.[1] The limiting language of *Flores* is essential, and the Court of Appeals properly applied the *Flores* construction of "member" when it held the evidence, viewed in the light most favorable to the jury's verdict, was insufficient to support Appellant's conviction beyond a reasonable doubt.

B. In contravention of the canons of construction, the State asks this Court to read "member" in isolation and hold that anyone who holds themselves out to be a commonly-defined member of an organization may be arrested, charged, and convicted if three or more individuals within that organization continuously or regularly associate in criminal activity—even if the commonly-defined member is unaware of criminal activity within that organization.

The State argued before the Seventh Court of Appeals that *Flores* provides the correct construction of "member;" before this Court, however, it abandons that argument in favor of a broad construction. *Compare* State's Brief-COA7 at 8 with State's Brief-CCA at 8). The plain language of section 46.02(a-1)(2)(C) criminalizes the possession of a handgun

---

[1] Distinctions between the State's Brief filed in the Seventh Court of Appeals by the Lubbock County Criminal District Attorney and the State's Brief in this Court by the State Prosecuting Attorney will be denoted as State's Brief-COA7 and State's Brief-CCA, respectively.

in a motor vehicle by "a member of a criminal street gang, as defined by Section 71.01." The State never provides a proposed definition for member, but the general thrust of the argument seems to advocate reading the term "member" as wholly separate from the context of the definition of "criminal street gang." State's Brief-CCA at 11. Without context, "member" does signify an ordinary meaning of that term exclusive of criminality. It follows, then, that an otherwise innocent person would trigger culpability by joining or participating in an organization deemed to be a criminal street gang with or without knowledge of that organization's criminal activity. *Cf.* 46.02(a-1)(2)(C). The State further argues that being a commonly-defined member of a criminal street gang (even if that member does not associate in crime) is enough to satisfy section 46.02(a-1)(2)(C). State's Brief-CCA at 12-13. The State argues that once three or more individuals work *together* to commit crime, that anyone associated with the group inherits criminality. State's Brief-CCA at 13. Appellant agrees that the three individuals must work together but also acknowledges that many organizations may contain three individuals who participate in criminal activity without the knowledge of the rest of

the association. Therefore, it is important to ensure that the legal definition of "member" for purposes of section 46.02(a-1)(2)(C) targets individuals who commit a requisite actus reus with a culpable mental state. *See* TEX. PENAL CODE § 6.02(b) ("If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element."). However, the State condemns that requiring "members" to be one of the individuals who associate in criminal activity is "unnecessarily restrictive." State's Brief-CCA at 12.

Giving the State the benefit of the doubt that it does not wish to prosecute law-abiding citizens, the State must be inferring that the culpable actus reus is joining an organization and the culpable mental state is joining an organization the defendant knows or should know to be criminal. State's Brief-CCA at 23-24; *cf.* TEX. PENAL CODE § 6.02(c) ("If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.").

But how can a citizen know that an organization rises to the legal definition of "criminal street gang?" One answer might be that the organization appears in the TXGANG database, but the statute does not include that restriction in its plain language. TEX. PENAL CODE § 46.02(a-1)(2)(C) & § 71.01(d). The definition requires that a "criminal street gang" only consist of three or more members who continuously or regularly associate in the commission of criminal activity. § 71.01(d). By its plain language alone, numerous associations are reached by this gang classification if only three individuals within an organization are required to associate in criminal activity. Thus, the restriction that a "member" personally associate in the commission of crime for purposes of section 46.02(a-1)(2)(C) is absolutely necessary.

Organizations such as the Boy Scouts, the Catholic Church, political parties, educational institutions, and athletic teams immediately come to mind. While true that on countless occasions small cohorts of members (and leadership) of associations such as these have regularly associated in criminal activity, these organizations are not routinely classified as gangs (although two years ago the Michigan attorney general considered classifying the Catholic Church as a criminal organization in

child sex abuse cases).[2] The limited construction of *Flores* that requires a legally-defined "member" to associate in the commission of crimes prevents the average parishioner from falling under the scope of unlawful carry by a gang member. These potential unconstitutional applications are palpable rather than preposterous possibilities. Thus, section 46.02(a-1)(2)(C) must be read together with section 71.01(d) in order to construe the statute in a way that provides for a culpable mental state and a clear criminal act.

II. The Court of Appeals applied section 46.02(a-1)(2)(C), which has been reenacted by the legislature without change, in a manner consistent with the legislature's intent to remove law-abiding citizens from the reach of unlawful carry prosecution and to extend to them the full benefit of their civil rights.

Criminalizing gun-carrying citizens for the sins of others within organizations to which they belong is doubtfully the intent of the legislature. *Cf.* H.R. Report, H.B. 1815, 80th Leg. R.S. (2007); Senate Comm. on Research, Bill Analysis, H.B. 1815, 80th Leg. R.S. (2007); House Comm. on Research, Bill Analysis, H.B. 1815, 80th Leg. R.S. (2007). The seminal rule of statutory construction is to presume that the legislature meant

---

[2] Juliet Linderman, Garance Burke and Martha Mendoza, *As Bishops Gather, Prosecutors Step Up Scrutiny of Church*, AP News (April 21, 2021, 3:45 PM), https://apnews.com/article/a9a988465ae944bd8dbd5094ebd562ad.

what it said. *Seals v. State*, 187 S.W.3d 417, 421, No. PD–0678–04, 2005 WL 3058041 (Tex. Crim. App. Nov. 16, 2005). To the extent this Court determines it must go beyond the language of the statute to determine whether the *Flores* interpretation or the State's newly proposed interpretation supports legislative intent, it may look at extra-textual factors including but not limited to circumstances under which the statute was enacted, legislative history, and consequences of a particular construction. TEX. GOV'T CODE ANN. § 311.023; TEX. PENAL CODE § 1.05(b) (making TEX. GOV'T CODE § 311.023 applicable to Penal Code); *Boykin*, 818 S.W.2d at 785–86. This Court may also look to other offense provisions contained in the same statutory section. *Sanchez*, 995 S.W.2d at 683.

A. This Court may reasonably infer that the legislature approved of the Flores *court's interpretation because the legislature has since re-enacted the statute without clarifying the definition of "member."*

"Certainly, when a legislature reenacts a law using the same terms that have been judicially construed in a particular manner, **one may reasonably infer that the legislature approved of the judicial interpretation**." *State v. Medrano*, 67 S.W.3d 892, 902 (Tex. Crim. App. 2002) (emphasis added); *see also Lewis v. State*, 127 S.W. 808, 812 (Tex. Crim. App. 1910) ("When an act or part thereof which has received a judicial interpretation is re-enacted in the same terms, or where words

used in a statute have a definite and well-known meaning in law, that construction or that meaning must be considered to have the sanction of the Legislature unless the contrary appears.").

The legislature re-enacted section 46.02, following *Flores*, in its 85th and 86th legislative sessions without adding to or clarifying the definition of "member" in 46.02(a-1)(2)(C). Acts of 2017, 85th Leg., R.S., ch. 1049, § 4; Acts of 2019, 86th Leg., R.S., ch. 216, § 1. This Court can reasonably infer that the legislature approved of the judicial interpretation of *Flores*. *See Medrano*, 67 S.W.3d at 902.

When the Texas Penal Code was reformed in 1973, section 46.02 prohibited any citizen from carrying a handgun, illegal knife, or club. Acts of 1973, 63rd. Leg., R.S., ch. 399, §1, p. 883. Over the years, the legislature created numerous exceptions to this rule to exclude lawful behavior. *See*, *e.g.*, Acts of 1995, 74th. Leg., R.S., ch. 229, § 2 (creating an exception for conceal carry license holders); Acts of 2005, 79th Leg., R.S., ch. 288, § 1 (creating an exception for the carrying of handguns in one's own vehicle).

Despite the intent of the legislature to legalize the carrying of handguns by otherwise lawful citizens while in their vehicles, "some district attorneys instructed police departments to continue making UCW ar-

rests of motorists who would qualify for the traveling presumption despite the clear intent of the legislature to establish protection for such motorists from such arrests." Senate Comm. on Research, Bill Analysis, H.B. 1815, 80th Leg. R.S. (2007). The legislature broadly expanded exceptions to unlawful carry and added a narrow provision that still included members of street gangs. Acts of 2007, 80th Leg., R.S., ch. 693.

Despite the legislature's clear intent to remove law-abiding citizens from the reaches of unlawful carry and the *Flores* court's narrow construction that only imparts criminal liability to criminals, the State argues this construction is unnecessarily restrictive. State's Brief-CCA at 13-15. The State contends this construction would prevent the State from arresting new gang initiates, sporadic or random gang participants. *Id.* It also mistakenly argues that the Court of Appeals expanded the statute to require "members to physically come [stet] together to commit gang crimes," which would prevent the State from penalizing those who commit financial or technological crimes and higher ups in the organization who direct or financially back operations. *Id*. The State must have incorrectly interpreted the *Flores* and Court of Appeals' holdings as invalidating the notion of gangs in general. Nowhere, however, do *Flores* or the Court of Appeals require persons to *physically* engage in crime together,

nor does the Court of Appeals change the meaning of "associate." *Id.* at 15.

The Court of Appeals held evidence was insufficient to support Appellant's conviction because the only evidence of Appellant's involvement with criminal activity, other than his commonly-defined membership in the Cossacks, was an arrest and charge for organized crime that was later dismissed. (3 RR 142-46). The State's own evidence showed that after the charges were dismissed, the Waco Police Department ran a background check on Appellant, found he had no criminal history that would prevent him from owning a gun, and returned Appellant's gun to him. (3 RR 142-46). The Record was insufficient to show that Appellant regularly *associated* in the commission of criminal activity—whether directly or peripherally. Thus, the Court of Appeals went no further than *Flores*.

Moreover, Appellant can think of no circumstances post-*Flores* where the State will not be able to arrest individuals who commit other crimes, even if those individuals do not meet the criteria of a gang "member" for purposes of unlawful carry. A new gang initiate or sporadic gang participant can be arrested for crimes they commit, such as theft, assault, aggravated assault, or robbery. Those who commit financial or technological crimes could be charged with, though it probably goes without saying, financial and technological crimes.

Defining "member" in section 46.02(a-1)(2)(C) in no way affects the use of section 71.01(d) in other statutes nor does the definition eviscerate the litany of offenses for which a person might be arrested or how someone might be classified as a gang member in other portions of the Penal Code. In fact, the entirety of Title 71 of the Penal Code, entitled "Organized Crime," enumerates all the offenses (and more) the State argues would go unpunished should the Court adopt the reasoning of *Flores* and affirm the decision of the Seventh Court of Appeals. Additionally, the State can still prosecute individuals under unlawful carry if that person, regardless of gang affiliation, is currently committing a crime. TEX. PENAL CODE § 46.02(a-1)(2)(A). These limitations allow prosecution for certain offenses without imparting criminality on otherwise law-abiding citizens.

B. An expansive interpretation of "member" would include law-abiding citizens—despite the legislature's numerous amendments to exclude lawful behavior—and would open the door for civil rights litigation against the State.

The State's frenzy to prosecute commonly-defined members of motorcycle clubs has caused the State to reject its earlier arguments in favor of *Flores* and to argue for an interpretation that most certainly would open the door for civil litigation. Recently in the Western District of Texas, a member of a motorcycle club named "Squad Veteran Riders Mo-

torcycle Club," brought suit alleging that improper inclusion as a "criminal street gang member" in the TXGANG database by the El Paso Police Department and one of its officers, individually, injured him by: (1) violating his right to associate under the First Amendment; and (2) attaching a stigma with legal disabilities (including deterring travel and preventing him from exercising his Second Amendment rights) under the Fourteenth Amendment's Due Process Clause. *Apodaca-Fisk v. Allen*, EP-19-CV-00259-DCG, 2021 WL 616999, at *1 (W.D. Tex. Feb. 16, 2021). By entering the plaintiff into the TXGANG database, the plaintiff alleged that in order to avoid criminal liability for unlawful carry he had to: (1) remove his motorcycle club stickers from his four-wheeled automobile; (2) stop attending monthly El Paso Motorcycle Coalition meetings; (3) attend fewer Texas Council of Clubs & Independents (COC&I) meetings and hide his motorcycle vest while en route to them, only donning it at the meeting; (4) stop attending El Paso Bike Nights; and (5) refrain from attending the annual Breast Cancer Awareness run in October 2019 and other charitable and political activities. *Id.* at *4. These allegations mirror the constitutional concerns raised by Appellant in the court below.

Though the Western District court originally denied the defendants' motion to dismiss for failure to state a claim, it revisited its decision based on the holdings of the Court of Appeals in this case and a similar

decision by the Court of Appeals in *Becker v. State*, 07-19-00286-CR, 2020 WL 4873870 (Tex. App.—Amarillo Aug. 19, 2020). *Apodaca-Fisk*, 2021 WL 616999, at *5. The court held the plaintiff could no longer establish "a credible threat of prosecution" based on his alleged facts because he had a government-issued license to carry, and he did not associate in criminal activity and therefore had two avenues to avoid prosecution for unlawful carry. *Id.* at *6. The limiting language of *Flores* and the Court of Appeals' clarification of that reasoning in this case, maintained the balance of honoring the legislature's intent to shield law-abiding citizens from prosecution under section 46.02(a-1)(2)(C).

III. This Court should adopt the narrow interpretation of "member" set forth in *Flores* and should affirm the decision of the Court of Appeals, which held evidence was insufficient to convict Appellant because it did not show he regularly associated in the commission of criminal activity.

Appellant Terry Martin is one of numerous commonly-defined members of various motorcycle clubs across the state who are challenging whether they meet the legal definition of "member" in section 46.02(a-1)(2)(C). Bikers are frequently targeted by law enforcement, as dash cam footage revealed in this case. Corporal Michael Macias explained to another officer, "Motorcycles, and I don't know if you work motorcycles very

often, they're the easiest gangs to confirm because they got their confirmation on their back. They're wearing these cuts." (6 RR 34 at 16:35). Officer Macias also described an incident a few days earlier where the President of the El Paso Bandidos was arrested despite having a concealed carry license. (6 RR 34 at 38:30); *cf. Becker*, 07-19-00286-CR, 2020 WL 4873870 at *1. Officer Macias also described multiple encounters with motorcyclists, how to identify them as gang members, and how he encouraged other officers to "start working some Bandidos." (6 RR 34 at 45:00-48:00).

These statements were made without reference to any purported danger or criminal behavior on the part of these motorcycle clubs. Bikers are simply easy arrests (except for perhaps Los Carnales MC members—a motorcycle club specific to law enforcement). This Court cannot imbue these individuals with criminality for otherwise lawful behavior and abridge their rights to free speech, to bear arms, and to due process when these individuals have no history of association in criminal activity within their respective motorcycle clubs.

In this case, the Court of Appeals reached the issue of Appellant's culpability using the standards of review applicable to sufficiency of the

evidence. Prior to trial, Appellant had a criminal record clear of convictions. Appellant testified that he joined the Cossacks MC over four years prior to trial, which would have been some time in 2014. (4 RR 38: *lines* 12-14). A gang expert for the State testified that the Cossacks MC was not on "the radar" until the Twin Peaks shooting in Waco on May 17, 2015. (3 RR 91-92: *lines* 19-4 ("radar"); 3 RR 29: line 29 (date of incident)). When asked about specific incidences of Cossacks criminal activity in Lubbock, the gang expert testified that he could not prove the Cossacks' criminal activities, stating, "The only thing I do have is just intelligence." (3 RR 95: *lines* 9-10).

Appellant admitted he was present at the Twin Peaks incident and was arrested, along with around 170 others who were present, and was charged with criminal organization. (4 RR 25-26). These charges were ultimately dismissed. (3 RR 145-46; 6 RR 23). After, police ran a background check and did not find anything that would prohibit Appellant from legally possessing a handgun. (3 RR 142-45). The Waco Police Department returned Appellant's gun to him. (3 RR 146). Other than this police report, the State introduced no evidence of any prior conviction, arrest, or criminal activity involving Appellant. (5 RR 51-71). Because

there was no evidence of Appellant's ongoing association with criminal activity among the Cossacks, the Court of Appeals rendered a judgment of acquittal. This Court should affirm that decision because the court properly applied section 46.02(a-1)(2)(C) by using the holding set forth in *Flores* that honors legislative intent while remaining constrained to the language of the statute.

PRAYER

Because the Court of Appeals applied section 46.02(a-1)(2)(C) in a manner consistent with the constitution, the rules of statutory construction, and the legislature's intent to shield law-abiding citizens from prosecution, and because the Record proved Appellant was a law-abiding citizen, Appellant asks this Court to affirm Appellant's acquittal by the Court of Appeals and for any other fair and just relief this Court deems just.

Respectfully Submitted,

/s/ Lorna L. Bueno

Lorna L. Bueno
State Bar No. 24086726

Joel Cook
State Bar No. 24044289

Lorna Law, PLLC
PO Box 1267
Shallowater, Texas 79363
Phone: (806) 482-1340
lorna@lornalaw.com

&

Joel Cook
Seymore Law Firm
810 Main Street
Lubbock, Texas 79401
Phone: (806) 747-3825
joel.cook@outlook.com

CERTIFICATE OF SERVICE

On April 23, 2021, I filed this brief through the e–filing system. All parties have therefore been served.

/s/ Lorna L. Bueno

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I, Lorna Bueno, attorney for Appellant, certify that this document was generated by a computer using Microsoft Word in Century Schoolbook 14–point font, and that such word processing program indicates that the word count of this document is 4,838 words, not counting the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of is-sues presented, statement of jurisdiction, statement of procedural his-tory, signature, proof of service, certification, certificate of compliance, and appendix. Tex. R. App. P. 9.4(i).

/s/ Lorna L. Bueno

Counsel for Appellant

APPENDIX A

BILL ANALYSIS

Senate Research Center
80R13177 JPL-D

H.B. 1815
By: Isett, et al. (Hinojosa)
Criminal Justice
5/17/2007
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The 79th Legislature, Regular Session, 2005, passed a law that was intended to legalize the carrying of handguns in private motor vehicles by persons not licensed by the Texas Department of Public Safety (DPS) to carry concealed handguns. Prior to that, the law had established a defense to prosecution against a charge of unlawful carrying of a weapon (UCW) if the person was traveling.

The 2005 law established a legal presumption in Section 46.15, Penal Code, that a person was traveling if he or she was in a private motor vehicle; was not engaged in criminal activity other than a Class C misdemeanor or other traffic regulation; was not prohibited by law from possessing a firearm; was not a member of a criminal street gang; and was not carrying a handgun in plain view.

However, some district attorneys instructed police departments to continue making UCW arrests of motorists who would qualify for the traveling presumption despite the clear intent of the legislature to establish protection for such motorists from such arrests in state code. Unsuspecting motorists who believe they are complying with the intent and spirit of the law could still face arrest and UCW charges – and then be forced to spend time and resources hiring an attorney to submit evidence that they qualify for the traveling presumption under the law.

H.B. 1815 clarifies that a person has a right to carry a handgun, club or certain knives on the person's own premises or premises under his control, or inside of, or en route, to a motor vehicle under the person's control. It would redefine the UCW offense in Penal Code Section 46.02 and specify that the same criteria a person has to meet in order to qualify for the traveling presumption under current law would need to be met under Section 46.02, Penal Code, to avoid committing a UCW offense.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 46.02, Penal Code, by amending Subsection (a) and adding Subsections (a-1) and (a-2), as follows:

> (a) Provides that a person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun, illegal knife, or club if the person is not on the person's own premises or premises under the person's control, or the person is inside or directly en route to a motor vehicle that is owned by the person or under the person's control.
>
> (a-1) Provides that a person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle that is owned by the person or under the person's control at any time in which the handgun is in plain view, or the person is engaged in criminal activity, other than a Class C misdemeanor that is in violation of a law or ordinance regulating traffic; the person is prohibited by law from possessing a firearm; or is a member of a criminal street gang, as defined by Section 17.01.

(a-2) Defines "premises" and "recreational vehicle."

SECTION 2. Reenacts and amends Section 46.15(b), Penal Code, as amended by Chapters 1221 and 1261, Acts of the 75th Legislature, Regular Session, 1997, as follows:

(b) Deletes existing text providing that Section 46.02 does not apply to a person who is on the person's own premises or premises under the person's control unless the person is an employee or agent of the owner of the premises and the person is a security guard. Provides that Section 46.02 does not apply to a person who is carrying a concealed handgun and a valid license issued under Subchapter H, Chapter 411, Government Code, rather than Article 4413(29cc), to carry a concealed handgun of the same category as the handgun the person is carrying. Provides that Section 46.02 does not apply to a person who holds a security officer commission and personal protection officer authorization issued by the Texas Private Security Board, rather than the Board of Private Investigators and Private Security, and is providing personal protection under Chapter 1702, Occupations Code, rather than the Private Investigators and Private Security Agencies Act.

SECTION 3. Repealer: Section 46.15(h) (defines "premises" and "recreational vehicle"), Penal Code.

Repealer: Section 46.15(i) (relating to the presumption of a person to be traveling), Penal Code.

SECTION 4. Makes application of this Act prospective.

SECTION 5. Effective date: September 1, 2007.

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Lorna Bueno
Bar No. 24086726
lorna@lornalaw.com
Envelope ID: 52790525
Status as of 4/26/2021 8:15 AM CST

Associated Case Party: State Prosecuting Attorney

Name	BarNumber	Email	TimestampSubmitted	Status
Margaret Emily Johnson-Liu	24032600	information@SPA.texas.gov	4/23/2021 6:51:29 PM	SENT
Stacey Soule	24031632	information@spa.texas.gov	4/23/2021 6:51:29 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jeff Ford		jford@lubbockcda.com	4/23/2021 6:51:29 PM	SENT
Terry Martin		tsmartin41@gmail.com	4/23/2021 6:51:29 PM	SENT

Associated Case Party: Terry Martin

Name	BarNumber	Email	TimestampSubmitted	Status
Joel Cook	24044289	debi.iden@seymorelaw.com	4/23/2021 6:51:29 PM	SENT